

**Commonwealth of Kentucky  
Workers' Compensation Board**

OPINION ENTERED: **June 8, 2018**

CLAIM NO. 201700692

WILLIAM FRASER

PETITIONER

VS.

**APPEAL FROM HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE**

GENERAL MOTORS, LLC  
And HON JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING IN PART  
VACATING IN PART  
AND REMANDING**

\* \* \* \* \*

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

**RECHTER, Member.** William Fraser appeals from the November 27, 2017 Opinion and Order and the January 11, 2018 Order on Reconsideration rendered by Hon. Jonathan R. Weatherby,

Administrative Law Judge ("ALJ"). The ALJ determined Fraser suffered a work-related injury and awarded permanent partial disability benefits. On appeal, Fraser challenges the ALJ's consideration of an alleged pre-existing condition, and requests further findings of fact regarding his entitlement to temporary total disability ("TTD") benefits. For the reasons set forth herein, we affirm the ALJ's decision but remand the matter to address the issue of TTD benefits.

Fraser worked for General Motors at its Corvette plant in Bowling Green. He was unloading floor panels from a basket when the cable and latch became stuck. He forcefully pulled one of the baskets, which caused him to fall backward. He struck his low back on the concrete floor.

After initially treating at the emergency room, Fraser visited Dr. Michael McNamara on July 20, 2015 with complaints of low back pain since the work accident. An August 1, 2015 MRI revealed spondylolisthesis with a left-sided pars defect. An x-ray revealed degenerative disease at L4-L5. Over the course of six months, Dr. McNamara treated Fraser with three epidural steroid injections, then eventually recommended surgery, which Fraser declined.

In an October 12, 2016 letter, Dr. McNamara assigned a 20% whole person impairment pursuant to the

American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition ("AMA Guides"). He noted Fraser's "spondylolisthesis predated the work place injury" and made no apportionment to a pre-existing active condition. In an October 20, 2016 letter, Dr. McNamara explained his "opinion that Mr. Fraser's pre-existing spondylolisthesis was in a dormant non-disabling state at the time of this work-related injury and that the work-related injury aroused that dormant non-disabling condition into painful reality."

Dr. Michael Best conducted an independent medical evaluation on February 22, 2017. Fraser provided a history of the work accident, and recounted low back injuries occurring in the early 1990s and 2006. However, Dr. Best's summary of the treatment following the 2006 accident indicates Fraser received thoracic spine care. Dr. Best also noted treatment for low back pain in 2009 at Dr. McNamara's clinic, and reviewed Fraser's medical treatment with Dr. McNamara following the work accident.

Dr. Best conducted a physical examination and functional capacity evaluation, noting sub-maximal effort and five positive Waddell findings. Relying on x-rays, he diagnosed mild degenerative disc disease. He also diagnosed a musculo-ligamentous sprain or strain of the lumbosacral

spine. Dr. Best explained the work accident caused this soft tissue sprain which had fully resolved, noting the August 1, 2015 MRI revealed no acute pathology. While noting the work-accident only caused a sprain or strain which resolved without permanent injury, Dr. Best acknowledged Fraser's ongoing pain. On this basis, he assigned a 2% whole person impairment rating as a result of the work injury.

Dr. Best also concluded Fraser suffered a pre-existing active low back condition and a 5% whole person impairment rating pursuant to the AMA Guides for Fraser's L5 pars defect and spondylolisthesis. He noted Fraser had "been treated for low back pain in 2006, 2007, 2008 and 2009". Later in his report, Dr. Best reiterated Fraser suffered a pre-existing active medical condition as a result of this spondylolisthesis and pars defect.

On July 17, 2017, Dr. McNamara was deposed. He explained that spondylolisthesis is a condition that can be dormant but become painful following an accident or fall. Dr. McNamara also explained his interpretation of the AMA Guides, and why he chose to evaluate Fraser using the DRE method. Finally, he reviewed treatment notes from his clinic and confirmed Fraser was treated for thoracic pain in 2006, 2007 and 2008, but received no low back treatment until 2009.

In the November 27, 2017 Opinion and Order, the ALJ dismissed Fraser's claim. He explained:

In order to be characterized as an active disability, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury. *Finley v. DBM Technologies*, 217 SW3d 261 (2007).

The ALJ, after reviewing the history of this Plaintiff and his injuries, has concluded that the opinion of Dr. Best is convincing in that the Plaintiff's spondylolisthesis predated the work-related injury and that the MRI dated August 1, 2015, revealed no new or acute pathology that was causally-related to the work event.

The ALJ finds that Dr. McNamara issued an impairment rating but neglected to apportion any amount to a pre-existing condition. He also initially used the DRE method but then opined that the range of motion method should be used. Dr. McNamara also opined that the condition was dormant and non-disabling prior to the work incident herein. These apparent but subtle changes in opinion lend credibility to the opinion of Dr. Best.

The ALJ finds, in accordance with the opinion Dr. Best that the Plaintiff had a pre-existing and impairment ratable condition and as such is precluded from receiving additional benefits herein.

Fraser petitioned for reconsideration, requesting the ALJ to reconsider the fact Dr. Best assigned a 2% impairment rating as a result of the work injury. Fraser

further challenged the conclusion he suffered a pre-existing active impairment, noting Dr. Best's opinion was based on a faulty history of low back treatment in 2006, 2007 and 2008. Fraser also emphasized that no evidence was submitted to establish his spondylolisthesis was active at the time of the work accident. He requested further findings of fact on the issue of a pre-existing condition, and to explain his consideration of Dr. McNamara's opinion. Finally, Fraser requested a decision regarding his entitlement to TTD benefits.

In a January 11, 2018 Opinion on Reconsideration, the ALJ revised his opinion to state:

The ALJ finds, in accordance with the opinion [of] Dr. Best that the Plaintiff had a pre-existing and impairment ratable condition but that he suffered a 2% whole person impairment as a result of the work injury.

He awarded permanent partial disability and medical benefits.

Fraser now appeals. He argues the ALJ's opinion fails to sufficiently apprise the parties of the basis of his decision, because he failed to state whether Fraser's pre-existing condition was active and symptomatic at the time of the work injury. In a related argument, Fraser contends the ALJ was required to determine whether his pre-existing condition was symptomatic at the time of the work accident.

Next, Fraser claims Dr. Best's opinion is unreliable due to an inaccurate medical history recounting low back treatment in 2006, 2007 and 2008. Finally, Fraser argues the ALJ's opinion contains material misrepresentations of fact about Dr. McNamara's medical opinion.

The common thread in these arguments is the consideration of a pre-existing condition. Fraser has framed much of his appeal on the determination he suffered a pre-existing active condition. Indeed, the ALJ began his analysis with a citation to Finley v. DBM Technologies, 217 S.W.3d 261 (2007), which requires that a pre-existing condition be symptomatic and impairment ratable immediately prior to the work accident in order to warrant a carve-out. Later, the ALJ concluded Fraser suffered a "pre-existing and impairment ratable condition." He relied on Dr. Best's opinion to reach this conclusion, which makes no mention of whether the condition was symptomatic.

The problem is that Dr. Best concluded the work accident did not arouse a pre-existing dormant conclusion. He diagnosed a musculoligamentous sprain as a result of the work accident. Dr. Best emphasized the fact Fraser's lumbar MRI revealed no acute injury or pathology. He also noted Dr. McNamara initially agreed the workplace injury was a "soft

tissue condition" and made no apportionment to a pre-existing condition. At points in his report, Dr. Best discusses Fraser's spondylolisthesis and pars defect, characterizing it as an "active medical condition" and referencing treatment between 2006 and 2009. However, when read in its entirety, it is clear Dr. Best's ultimate conclusion is that Fraser suffered a muscle or ligament strain as a result of the work accident, and that this strain was not an arousal of a pre-existing condition. Rather, it was an unrelated injury.

For this reason, we do not believe it was necessary for the ALJ to offer further findings of fact regarding the pre-existing condition, or to analyze whether it was symptomatic at the time of the accident. Moreover, even if Dr. Best inaccurately noted low back treatment from 2006 through 2008, this reference is irrelevant to his ultimate conclusion that the work accident did not arouse a pre-existing condition, regardless of whether it was symptomatic or impairment ratable. We further note, despite this apparently inaccurate reference, Dr. Best acknowledges later in his report that Fraser was not receiving low back treatment after 2010. Even Fraser seems to acknowledge this distinction in his petition for reconsideration, in which he asked the ALJ to assign a 2% impairment rating "even if you agree with



Dr. Best's statement that it is a pre-existing active condition."

We acknowledge the ALJ's language is less than precise on this issue, and his analysis is slim. However, it sufficiently sets forth the facts upon which he exercised his discretion. Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004). The ALJ was dissuaded by Dr. McNamara's change in opinion; he initially made no apportionment for a pre-existing low back condition, then amended his statement later to state the work accident aroused a dormant condition. He relied instead upon Dr. Best's opinion, which is accurately summarized in the opinion. It is within the ALJ's discretion to evaluate competing medical opinions and choose one upon which to rely. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). It is clear the ALJ adopted Dr. Best's ultimate opinion that Fraser suffered a distinct injury unrelated to his pre-existing condition. The opinion, while brief, sufficiently informs the parties of the basis of the ALJ's decision. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

Fraser has set forth a number of findings of fact that the ALJ could have made, and challenged the accuracy of

other conclusions. For instance, the ALJ stated Dr. McNamara admitted in his testimony that the range of motion method should have been used. In fact, Dr. McNamara acknowledged that either method could be used, and the higher impairment rating should be adopted. However, we find this inaccuracy harmless because the ALJ is not required to explain in minute detail every reason he chooses to rely upon one medical expert over another. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). The conclusion remains, the ALJ was more persuaded by Dr. Best's opinion. Dr. Best's opinion constitutes the requisite substantial evidence to support the award. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). For this reason, it is not the prerogative of this Board to disturb the ALJ's decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

As a final matter, Fraser requests additional findings of fact regarding his entitlement to TTD benefits. He requested these additional findings of fact in his petition for reconsideration, but the ALJ failed to analyze the issue. Therefore, this claim is remanded to the ALJ for an analysis as to Fraser's entitlement to TTD benefits.

Accordingly, the November 27, 2017 Opinion and Order and the January 11, 2018 Order on Reconsideration are

hereby **AFFIRMED** but this claim is **REMANDED** for further findings of fact concerning Fraser's entitlement to temporary total disability benefits.

ALL CONCUR.

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